RIVIERA BAY RESORT & CONDO MANAGEMENT SDN BHD

v.

SRI RIMBA MENTARI DEVELOPMENT SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-416 OF 2002]
10 JUNE 2003

CIVIL PROCEDURE: *Trial - Procedure - Consolidation of summonses - Transfer of proceedings from Magistrate's Court to Sessions Court - Whether High Court had jurisdiction to grant order to transfer and consolidate - Whether consolidation could be allowed when there were cross-actions - Subordinate Courts Rules 1980 O. 8 r. 18(1), O. 47 - Subordinate Courts Act 1948 s. 66*

In 1999, the respondent, *vide* a magistrate court's summons, claimed against the applicant for arrears of rental. The applicant filed a defence in 1999 but later applied to amend the same, in order to include a counterclaim and set-off against the respondent in the amount of RM26,624.86. This application was dismissed. Subsequently, the applicant filed a claim for the said sum against the respondent in the sessions court which registered it as a sessions court summons. The applicant then applied to the Chief Judge of Malaya for leave to transfer the magistrate's court summons to the sessions court, and thereafter, filed an application to the sessions court for an order to transfer same to the sessions court and for the said summons to be consolidated and heard together with the sessions court summons. This application was again dismissed. In the meanwhile, the Chief Judge of Malaya issued a direction that the applicant apply to the High Court to transfer the magistrate's court summons to the sessions court, which the applicant did. The respondent objected to the applicant's application to the High Court on the ground that the court had no jurisdiction to make such order of transfer and consolidation as O. 8 r. 18(1) and O.47 of the Subordinate Courts Rules 1980 ('SCR 1980') only conferred such powers to the subordinate courts. Furthermore, s.66 of the Subordinate Courts Act 1948 ('SCA 1948') did not apply as there was no counterclaim. The respondent also contended that the application would undermine the magistrate's decision who dismissed the applicant's application to amend his defence by including the counterclaim and set-off. It was further contended that a consolidation could not be granted because, in the magistrate's court, the applicant was the defendant while in the sessions court summons it was the plaintiff.

Held (allowing the application):

[1] The objections based on O. 8 r. 18(1) and O. 47 of the SCR 1980 and s. 66 of the SCA 1948 were unsustainable. (p 724 b)

[2] Since the applicant applied to the Chief Judge of Malaya for an order to transfer and was then directed by the latter to apply to the High Court, the learned Chief Judge, thus, must have contemplated that the High Court has unlimited jurisdiction. (*Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58 followed) (p 725 e)

[3] The Schedule to the Courts of Judicature Act 1964 sets out the additional powers of the High Court. 'Transfer of proceedings' is expressly provided for in para 12 which vests to the High Court the power to make an order of transfer and consolidation of proceedings in subordinate courts. (p 725 f-g)

[4] The court should allow consolidation regardless of the cross-actions as the two summonses related to the same unit of condominium as the sole subject matter of litigation and involved common questions of law or fact between the applicant and the respondent. Furthermore the applicant and the respondent retained their respective solicitors in both summonses. (p 727 g-h)

[5] The court should allow consolidation and the sessions court summons shall be treated as an adjunct proceeding to the magistrate's court summons by virtue of para 4.1.3 of the Malaysian High Court Practice which states that ".. consolidation may be possible if the court treats one action as an adjunct proceeding, e.g. the plaintiff could be converted into a counterclaiming defendant". (p 728 c-d)

Case(s) referred to:

Amanah Finance Malaysia Berhad v. Aura Vista Sdn Bhd & Ors [2000] 5 CLJ 229 ***(refd)***
Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 ***(refd)***
Kee Choi Heng v. Ketua Polis Daerah Kuala Muda & Anor [1999] 2 CLJ 664 ***(refd)***
Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors [1997] 2 CLJ 58 ***(refd)***
Syarikat Multi Wood (a firm) v. Foosan Timber Industries Sdn Bhd & Anor [1992] 4 CLJ 1915 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, para 12 of the Sch
Rules of the High Court 1980, O. 4 r. 1(1)
Subordinate Courts Act 1948, s. 66
Subordinate Courts Rules 1980, O. 8 r. 18(1), O. 47 rr. 5(1), (2)

Other source(s) referred to:
Malaysian High Court Practice MLJ, [1998], Desk Edn. pp. 48-58, para 4.1.3

For the respondent - WP Leong; M/s WP Leong & Partners
For the applicant - Sharifah Noorin Alhabshi (Zairin Dzainal Abidin); M/s Taye & Co

Reported by Yasmin Norhazleena

JUDGMENT

Low Hop Bing J:

Application

This is an application by way of an originating summons in encl. (1) filed by the applicant for an order that Melaka Magistrate's Court Summons No. 72-1254-1999 ("magistrate's court summons") be transferred to Melaka Sessions Court 2, and be consolidated with summons No. 52-648-2001 of that sessions court ("sessions court summons") on the ground that these two summonses are closely connected, involving almost the same witnesses, and subject matter, whereby much time and costs would be saved.

Factual Background

In the magistrate's court summons, the respondent on 18 June 1999 claimed a sum of RM9,756 by way of arrears of rental against the applicant who then filed a defence on 27 July 1999, which the applicant sought to amend on 13 February 2001, in order to include a counterclaim and set-off against the respondent in the sum of RM26,624.86 as at 1 August 2001 for administrative fees, water and electricity bills, charges for air conditioners, quit rent and insurance for the premises in question, known as KP-3-07 (A3), Riviera Bay Resort Condominiums, 10 Km, Jalan Tanjung Kling, Melaka ("the premises"), but the application for amendment was dismissed with costs.

Subsequently, the applicant filed a claim for the said sum of RM26,624.86 against the respondent in the sessions court Melaka which registered it as the sessions court summons.

The subject matter in both these summonses concern the tenancy agreement executed on 25 July 1992 between the respondent as landlord and the applicant as tenant in respect of the said premises.

On 5 December 2001, the applicant wrote to the learned Chief Judge Malaya for leave to transfer the magistrate's court summons to the sessions court.

On 7 December 2001 the applicant, pending the decision by the learned chief judge, filed an application in the sessions court for an order to transfer the magistrate's court summons to the sessions court, and to be consolidated and heard together with the sessions court summons, but that application was dismissed by the sessions court on the ground that that application should be filed in the magistrate's court.

Vide letter dated 18 June 2002, the applicant was informed by the special officer to the learned chief judge that an application for transfer of the magistrate's court summons to the sessions court should be made to the High Court.

Hence, the instant application before me.

Jurisdiction

En WP Leong, learned counsel for the respondent, raised a preliminary objection on the ground that the High Court has no jurisdiction to make an order of transfer and consolidation sought by the applicant since the two summonses were within the respective jurisdiction and competency of the subordinate courts.

Respondent's learned counsel contended that s. 66 of the Subordinate Courts Act 1948 ("SCA 1948") has no application here as there was no counterclaim, but instead there was a claim each arising from the magistrate's court and the sessions court. He added that para 3(2) in the Third Schedule to the SCA 1948 merely referred to the transfer of any proceedings to another court of coordinate jurisdiction.

In respect of the rules, it was argued for the respondent that under O. 8 r. 18(1) and O. 47 of the Subordinate Courts Rules 1980 ("SCR 1980") the powers to order a consolidation and transfer of proceedings respectively, are conferred only on the subordinate courts.

Respondent's counsel took the stand that O. 4 r. 1(1) of the Rules of the High Court 1980 ("RHC 1980") concerns consolidation of proceedings in the High Court and not the subordinate courts, while the inherent jurisdiction of the High Court under O. 92 r. 4 of the RHC 1980 cannot be invoked as there are already existing express rules.

He added that para. 12 in the Schedule to the Courts of Judicature Act 1964 ("para 12") does not confer power on the High Court to transfer a proceeding from a magistrate's court to a sessions court and *vice versa*, as the summonses were not in the High Court.

Puan Sharifah Noorin Alhabshi and Cik Zairin Dzainal Abidin, both learned counsel for the applicant, argued that this court has the jurisdiction to make an order of transfer and consolidation, as this application was made pursuant to the instruction of the learned chief judge. They relied on para 12.

In my judgment, I do not find the aforesaid submissions based on s. 66 of the SCA 1948, O. 8 r. 18(1) and O. 47 of the SCR 1980, to be of any assistance to the respondent.

The pertinent provisions which call for consideration and determination herein are to be found in the Schedule to the Courts of Judicature Act 1964 ("CJA 1964") which sets out the additional powers of the High Court.

"Transfer of proceedings" has been expressly provided for in para. 12 which merits reproduction as follows:

> 12. Transfer of proceedings.
>
> Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

Para 12 came up for judicial consideration by Augustine Paul J in *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22 where the question for decision revolved around "the power of a branch High Court to transfer a proceeding pending before it to another branch High Court." The facts in that case revealed that the plaintiff was a licensed stockbroker with its registered office in Melaka while the defendant's last known address was in Kuala Lumpur. The defendant applied for but failed to obtain an order to transfer his case to the High Court of Malaya in Kuala Lumpur. In relation to para. 12, the learned judge held at p. 122 as follows:

(1) That the word "court" in the phrase "Power to transfer any proceeding to any other court" goes beyond the two High Courts viz. the High Court of Malaya and the High Court of Sabah and Sarawak.

(2) That the power given to transfer any proceeding is only from a High Court "to" any High Court and not "from" any other High Court to itself.

(3) That the exercise of the power conferred by para. 12 to transfer a proceeding to any other court in the light of the proviso to it shall be exercised in such manner as may be prescribed by rules of court and that the rules contemplated by the proviso constitute a condition precedent to the exercise of the power conferred by para. 12.

It is necessary to observe that in so far as para. 12 is concerned, the focus of the judgment was in respect of the transfer of proceedings from a High Court to another High Court of co-ordinate jurisdiction.

In *Amanah Finance Malaysia Berhad v. Aura Vista Sdn Bhd & Ors* [2000] 5 CLJ 229, the plaintiff filed a writ of summons against the defendants in Kuala Lumpur High Court. The second and third defendants applied for the writ to be transferred to the Penang High Court. Abdul Wahab Patail J referred to para. 12 and agreed with the reasoning of Augustine Paul J in *Malacca Securities, supra*, that the proviso thereto is a condition precedent to the exercise of the power under that paragraph, thereby holding that a branch of the High Court cannot exercise the power to transfer any case to another branch of the High Court unless the requisite rules have been made.

In these two judgments, the respective learned judges alluded to the alternative remedy of the defendants to make an application to the learned Chief Judge under s. 20 of the CJA 1964 regulating the distribution of business among the judges of the High Court in accordance with such directions as may be given by the learned Chief Judge.

As the applicant before me has indeed applied to the learned Chief Judge for an order of transfer, and has been directed to apply to this High Court, the learned Chief Judge must have contemplated that this court has the jurisdiction which is unlimited: *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58, as referred to in *Malacca Securities, supra*.

In my view, the jurisdiction of the High Court in making an order of transfer and consolidation of proceedings in subordinate courts has been expressly provided for in para 12, particularly the words **"Power to transfer any proceedings** .... to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any **directions as to the further conduct thereof** (emphasis added).

There is no doubt in my mind that the words "any proceedings" in para 12 are sufficiently wide to cover the power to order the transfer of the following proceedings:

(a) from the High Court to any subordinate court and *vice versa*;

(b) from any sessions court to any sessions court and *vice versa*; and

(c) from any sessions court to any magistrate's court and *vice versa*;

I agree with the judgment of Mohd Hishamuddin J in *Kee Choi Heng v. Ketua Polis Daerah Kuala Muda & Anor* [1999] 2 CLJ 664 that under para. 12 only the High Court has the power to transfer a civil case from a sessions court to a magistrate's court and *vice versa*.

In *Malacca Securities, supra,* Augustine Paul J also observed that the language employed in para. 12 itself in the case of transfer of proceedings in the subordinate courts is widely worded to authorize transfer "to or from any subordinate court";

As the proviso to para. 12 says that this power of transfer shall be exercised in such manner as may be prescribed by any rules of court, it is necessary to explore the existence of such rule or rules. O. 47 r. 5(1) and (2) of the SCR 1980 comes to mind immediately and where relevant, is reproduced as follows:

> 5(1) Where by an order of the High Court any proceedings are ordered to be transferred to a Sessions Court, ... the Registrar must, on receipt of the order or certified copies thereof, enter proceedings in the appropriate Book, and give notice in Form 138, at least 14 days before the return day, to every party to appear before the Court for such directions as to the further conduct of the proceedings.
>
> (2) Subject to any directions contained in the order of the High Court, the trial shall proceed as if the proceedings had commenced in a Sessions Court.

In my view, the provisions under O. 47 r. 5(1) and (2) of the SCR 1980 contain the necessary procedural mechanism for the purposes of effecting the transfer of civil cases from a sessions court to a magistrate's court and *vice versa* under the High Court's substantive power in para 12.

Next, the jurisdiction of the High Court to order a consolidation is clearly manifested in the words "to give any directions as to further conduct thereof in para. 12 and such a power coincides with the procedural rule expressed in O. 47 r. 5(2) of the SCR 1980 which envisages any directions contained in the order of the High Court.

Further, O. 4 r. 1(1) of the RHC 1980 and O. 8 r. 18(1) of the SCR 1980 contain equipollent provisions regulating the respective procedure in the High Court and the subordinate courts to order consolidation, in the following words:

> Consolidation, etc of causes or matters (O. 4 r. 1)
>
> (1) Where two or more causes or matters are pending, then, if it appears to the Court:
>
> (a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

Order 8 r. 18(1) of the SCR 1980 contains the additional words "in the same Court" after the word "pending" in the first line thereof.

Having considered and determined the question of the jurisdiction of the High Court in respect of a transfer and consolidation and the governing procedure, I shall now consider the merits of the application herein.

Merits

In respect of the merits of the instant application, it was argued for the respondent that the applicant's attempt to amend the defence by including a counterclaim and set-off in the magistrate's court summons has been dismissed with costs by the learned magistrate and there was no appeal against that dismissal.

It was also contended for the respondent that the application for transfer and consolidation would undermine the decision of the learned magistrate who has dismissed the applicant's application for the proposed amendment to include the counterclaim.

The respondent then submitted that in the magistrate's court summons, the applicant is the defendant while in the sessions court summons, the applicant is the plaintiff, as a result of which on the authority of *Syarikat Multi Wood (a firm) v. Foosan Timber Industries Sdn Bhd & Anor* [1992] 4 CLJ 1915, there could be no consolidation.

For the applicant, it was stressed that the aforesaid grounds in support of the instant application are sufficient for the purposes of enabling the court to order a consolidation.

On my part, it is pertinent to observe that the two summonses relate to the same unit of condominium as the sole subject matter of litigation and involve common questions of law or fact between the applicant and the respondent, who are respectively represented by the same firms of solicitors and the witnesses are substantially the same.

The only factor that may militate against consolidation is that there are cross-actions here, and I am mindful of the decision of Chong Siew Fai J (later CJ (SS)) in *Syarikat Multi Wood*, *supra*, that consolidation is not possible where the plaintiff in one action is the defendant in the other action. Be that as it may, two other facts in that case are significant viz the plaintiffs in the two actions were represented by different firms of advocates and the defendants in the two actions were also represented by different firms of advocates, which is not the case in the application before me, as the respective solicitors are the same.

It is vital to observe that there is an instructive passage in the *Malaysian High Court Practice MLJ* [1998] Desk Edn. pp. 48-58 para 4.1.3 which reads as follows:

> ... consolidation may, however, be possible in such cases if the court treats one action as an adjunct proceeding, eg. the plaintiff could be converted into a counterclaiming defendant ... .

I agree with this passage and hereby apply it to the instant application.

Conclusion

In the light of the foregoing grounds, I allow the application in encl. (1) in the following terms:

1. the magistrate's court summons is hereby transferred to the sessions court;
2. the magistrate's court summons is hereby consolidated with the sessions court summons;
3. the sessions court summons shall be treated as an adjunct proceeding to the magistrate's court summons, and the applicant being the plaintiff in the sessions court summons shall be converted into a counterclaiming defendant;
4. The applicant's claim against the respondent in the sessions court summons shall be proceeded and tried as a counterclaim in the respondent's claim against the applicant in the magistrate's court summons;
5. Upon the transfer and the consolidation, the two summonses shall be heard and disposed of in the same proceeding by the learned sessions court judge; and costs in the cause.